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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 239

MARION M. PICKLE, JR.,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Petitioner Marion M. Pickle, Jr., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in this cause on January 8, 1964, and upon which a motion to rehear was denied by the Supreme Court of Tennessee on April 30, 1964.

CITATIONS TO OPINION BELOW

All references to the record herein will refer to the numbers in the left column of the pages of the certified record of the Supreme Court of Tennessee, which is filed herein, and will be designated as follows: "(R., p.)".

Memorandum Opinion of the Supreme Court of Tennessee is as yet unreported. The original opinion of the Supreme Court of Tennessee appears at R., p. 237, and a copy is annexed hereto as an Appendix on page A1.

The judgment pursuant to the original opinion of the Supreme Court of Tennessee appears at R., p. 242, and a copy is annexed hereto as an Appendix on page A4.

The opinion of the Supreme Court of Tennessee on the petition to rehear was filed by the Court on April 8, 1964, is as yet unreported, and appears at R., p. 250, and a copy is annexed hereto as an Appendix on page A5.

The order denying the petition to rehear was entered on April 30, 1964, and appears at R., p. 253, and a copy is annexed hereto as an Appendix on page A7.

JURISDICTION

Final judgment of the Supreme Court of Tennessee was entered on April 30, 1964 (R., p. 252). Jurisdiction of this Court is invoked under 28 U.S.C., 1257(3).

HOW FEDERAL QUESTIONS ARE PRESENTED

For convenience and clarity, the parties will be referred to as they appeared in the trial court, to-wit: the petitioner as "defendant," and respondent as "the State".

(1) Defendant was indicted November 23, 1962, by the grand jury of Knox County, Tennessee, upon the charge of assault and battery upon the person of one J. E. Banks, Sr. The case was tried in the Criminal Court for Knox County, commencing on April 4, 1963 and terminating with a verdict of guilty on April 9, 1963, the jury

having been respited from April 5 to April 9 (R., pp. 152-154). The jury assessed a fine of $51.00 as punishment of the defendant (R., p. 154). On his own volition, the trial judge thereafter added a workhouse sentence of 90 days, making the final judgment provide for $51.00 fine and confinement in the workhouse for 90 days (R., p. 17).

The motion for new trial was timely filed (R., p. 16), and overruled (R., p. 17). A motion in arrest of judgment was filed (R., pp. 19-28), and overruled (R., pp. 29-31), and the case appealed to the Supreme Court of Tennessee, resulting in the judgment being affirmed, as aforesaid.

Prior to trial, the defendant filed a plea in abatement to the indictment (R. pp. 5-8), setting forth that the juries which indicted him and tried him had not been selected in accordance with the statutes of the State of Tennessee, to-wit: Chapter 173, Private Acts of Tennessee for the year 1911, as amended, in that a jury commission of three members had not made up the list of jurors who were to serve; the jurors were unlawfully selected by one individual, rather than by the jury commission; the one individual designated the persons whom he desired to serve as jurors and prepared a list, which list he turned over to the Judge of the Criminal Court and the jurors were drawn by said Judge and not drawn by lot or at random by a child under 10 years of age, as required by said Act; said list submitted to the Judge was not compiled by said individual from a list furnished him by the Justices of Peace of Knox County, as required by the statute. The State joined issue on the plea in abatement by replication (R., p. 11), and the plea in abatement was overruled. (R., p. 12).

Defendant contends such action by the trial court denying the plea in abatement, and thus denying him the

right to an impartial jury in accordance with law, deprived him of his rights under the Fourteenth Amendment to the Constitution of the United States, in that he was deprived of his liberty without due process of law, and was denied the equal protection of the law.

After conviction, defendant filed a motion in arrest of judgment, setting forth that the matters raised by said plea in abatement denied his rights under the Constitution of the United States, in that he was thus deprived of his constitutional rights to a fair and impartial trial by a jury, and deprived of equal protection of the laws and of due process of the laws. (R., pp. 19-21). The motion in arrest of judgment was overruled. (R., pp. 29-31).

(2) When this case came on for hearing in the Supreme Court of Tennessee, it appeared that the transcript of the case did not contain evidence showing the jury list from which the petit jury in the lower court had been drawn, and the manner in which the grand and petit jurors had been selected in defendant's case, and for this reason a motion was filed by the defendant on October 4, 1963, in the Supreme Court of Tennessee suggesting a diminution of the record, seeking an order upon the Clerk of the trial court to supply the evidence which had not been included in the transcript. (R., p. 183). The Supreme Court of Tennessee, in its opinion, recites that there was no evidence in the record with respect to the manner in which the petit and grand jurors were selected, or that the petit and grand jurors were selected unlawfully (R., p. 239), and ignored the motion suggesting a diminution of the record. The Supreme Court of Tennessee thus refused to order the Clerk of the trial court to supply the deficient evidence. The defendant filed a petition to rehear in the Supreme Court of Tennessee, on January 16, 1964 (R., p. 243), pointing out that the Supreme Court of Tennessee had

failed to act upon his motion suggesting a diminution of the record. The Supreme Court in its opinion on the petition to rehear states that the motion suggesting a diminution of the record was overruled because nothing could be gained by bringing up the matters set forth in the motion. (R., pp. 250-252).

The refusal of the Supreme Court of Tennessee to order a complete record as to what transpired in the trial court was a deprivation by the State of defendant's liberty without due process of law, and a denial to the defendant of the equal protection of the law.

QUESTIONS PRESENTED

Question No. 1. Was defendant denied due process of law, and equal protection of the law, as guaranteed him under the Fourteenth Amendment to the Constitution of the United States, by reason of his having been indicted and tried by a grand jury and petit jury, respectively, which juries were illegally hand-picked, rather than being selected at random, or lot, as required by the laws of the State of Tennessee?

Question No. 2. Was defendant denied due process of law, and equal protection of the law, as guaranteed him under the Fourteenth Amendment to the Constitution of the United States, by the action of the Supreme Court of Tennessee in denying defendant's motion suggesting a diminution of the record, and thus depriving him of the evidence in the trial court, which showed that the grand jury which indicted him, and the petit jury which tried him, were illegally selected?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> "§1. **Citizenship—Due process of law—Equal protection.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI[2] of the Constitution of the United States provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

STATEMENT

See "HOW FEDERAL QUESTIONS ARE PRESENTED", *supra*.

REASONS FOR GRANTING THE WRIT

Question No. 1. The question presented here is of major importance and significance to the administration of justice, not only for this defendant, but for all others similarly situated.

Both the grand and petit jurors in this case were unlawfully hand-picked, appointed and selected by one individual rather than by lot. The jurors were contaminated with such bias and prejudice, and convictions, as this one person who selected them possessed. The jurors did not represent a cross-section of the population and could not be peers of defendant. These jurors could well have been selected by this one person because they were liberal, conservative; white, colored; Jew, Gentile, Catholic, Protestant, or Mohammedan, all depending upon the views of the person who selected them. To permit jurors to be selected in this manner destroys the element of fundamental fairness essential to the very concept of justice.

The right to an impartially selected jury is guaranteed by the Fourteenth Amendment. *Wolfe* v. *Nash*, (C.C.A., Mo., 1963) 313 F.2d 393, cert. denied 374 U.S. 817, 83 S. Ct. 1713; *U. S. ex rel. Sturdivant* v. *State of New Jersey*, (C.C.A., N.J., 1961) 289 F.2d 846, cert. denied 368 U.S. 864, 82 S. Ct. 109.

The equal protection of the law clause of the Fourteenth Amendment applies to all actions of a State by whatever modes such action be taken, whether it be legislative, executive or judicial. *Standard Computing Scale Co.* v. *Farrell*, 249 U.S. 571; *Missouri* v. *Dockery*, 191 U.S 170; *Ex parte Virginia*, 100 U.S 347

The illegal and unlawful actions of a board or commission, such as a jury commission in the selection of juries, is an action under color of State law, and comes within the prohibitions of the Fourteenth Amendment with respect to due process and equal protection of the law. *Gray* v. *Sanders*, 372 U.S. 368, 83 S. Ct. 801; *Mooney* v. *Hollohan*, 294 U.S. 103, 98 A.L.R. 406; *Southern Ry. Co.* v. *Commonwealth*, 290 U.S. 190, 54 S. Ct 148; *U. S. ex rel.*

Weber v. *Rogan*, (C.A., Ill., 1949) 176 F.2d 579, cert. dismissed 338 U.S. 809, 70 S. Ct. 49; *Pacific Gas Imp. Co.* v. *Ellert*, (C.C., Calif., 1894) 64 Fed. 421; *Williams* v. *Kansas City, Mo.*, (D.C., Mo., 1952) 104 F. Supp. 848, affirmed 205 F.2d 47, cert. denied 346 U.S. 826, 74 S. Ct. 45.

Defendant in this case was denied his rights to a trial by a fair and impartial jury. Due process means fair play, and is that process of impartial law which is binding because it is right. A fair trial is implicit in the term "due process of law".

Due process was aptly defined in *Breithaupt* v. *Abram*, 352 U.S. 432, 77 S. Ct. 408, wherein this Court said that it is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct.

The due process clause requires that action by a State through any of its agencies must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which are not infrequently designated as "the law of the land". *Buchalter* v. *People of State of N. Y.*, 319 U.S. 427, 63 S. Ct. 1129.

Question No. 2. The refusal of the Supreme Court of Tennessee to grant the motion suggesting a diminution of the record so as to bring up the evidence showing the illegal and unlawful manner in which the juries were selected was a denial to defendant of due process. See *Nesbit* v. *Riesenman*, (1930) 148 Atl. 695, 298 Pa. 475, cert. denied 281 U.S. 754, 50 S. Ct. 408; *Huntington* v. *N. Y.*, (C.C., N.Y., 1902) 118 Fed. 683, affirmed 193 U.S. 441, 24 S. Ct. 505.

The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice, and is not to be based upon the idiosyncrasies of a mere personal judgment, and an important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review, but there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty. *Malinsky* v. *People of State of N. Y.*, 324 U S. 401, 65 S. Ct. 781.

Rule 9, Rules of the Supreme Court of the State of Tennessee, provides for suggestions of diminution of record. (209 Tenn. 790). A copy of the Rule is annexed hereto as an Appendix on page A8.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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